IN RE ALVES

HOUSE OF LORDS
LORD TEMPLEMAN, LORD ROSKILL,
LORD BRIDGE OF HARWICH,
LORD GOFF OF CHIEVELEY,
LORD JAUNCEY OF TULLICHETTLE
29 OCTOBER 1992

EXTRADITION: Request by foreign government - Extradition request based upon evidence of accomplice - Accomplice subsequently retracting evidence - Whether there was sufficient evidence to justify committal of the respondent pending extradition - Extradition under old procedure - Whether discretion conferred on the Court under s.11(3) Extradition Act 1989 applies.

The Swedish government made a request for the extradition of the respondent on charges relating to the importation of cannabis into Sweden which charges were filed based upon the evidence of an accomplice of the respondent given in a Swedish Court. At the committal proceedings, the accomplice repudiated his evidence before the Swedish Court in so far as it implicated the respondent. The Magistrate nevertheless committed the respondent to custody pending extradition.

The respondent applied for a writ of *habeas corpus* on the grounds that the accomplice's evidence, which had been retracted, was worthless and wholly unreliable and so incapable of forming the basis of a committal. The respondent further contended that before he could be committed there must be evidence to the effect that the Courts of the requesting state had jurisdiction, under its own laws, to try him for his participation in the offences committed in Sweden, when he himself was not in Sweden at the relevant time.

The respondent also sought to invoke s.11(3) of the Extradition Act 1989 in support of his application on the grounds that it would be unjust or oppressive to return him to Sweden. The Divisional Court allowed the respondents' application and the Director of Public Prosecutions acting on behalf of the Swedish government appealed.

Held:

[1] The foreign warrant was duly authenticated. The evidence produced included a transcript of the accomplices' evidence before the City Court of Goteborg. That evidence was, *prima facie*, of itself sufficient to justify the decision of the Magistrate that the respondent should be committed.

[2] The fact that the accomplice retracted his earlier evidence cannot *ipso facto* render the evidence of the accomplice worthless, even where the evidence is uncorroborated. If the prosecution evidence is such that its strength or weakness depends on the view to be taken of its reliability, the Magistrate is entitled to act upon that evidence in deciding whether there is sufficient evidence to justify an order for committal.

[3] Under the provisions of the Extradition Act 1870, which also applies to the old procedure in the 1989 Act, the Magistrate is not concerned with questions of foreign law at all, being only concerned with committal proceedings under English procedure in relation to an English crime or crimes specified in the Secretary of State's order to proceed. The Magistrate in the present case committed no error in failing to ascertain the scope of the jurisdiction of the Swedish Courts.

[4] Section 11(3) of the 1989 Act applies only to the new procedure for extradition and has no application to the old procedure which is applicable in the present case. The Court had no discretion in extradition matters to refuse to make an order on the grounds of abuse of process of Court, such discretion being vested in the Secretary of State.

[Appeal allowed].

Cases referred to:

R. v. Galbraith [1981] 73 Cr. App. R. 124 at p. 127 ***(refd)***
Haw Tua Tau v. Public Prosecutor [1982] AC 136 at p. 151 / [1981] 1 CLJ 123 ***(refd)***
R. v. Zossenheim [1903] 20 TLR 121 ***(refd)***
R. v. Golder [1960] 1 WLR 1169 ***(refd)***
R. v. Oliva [1965] 1 WLR 1028 at pp. 1036-7 ***(refd)***
Driscoll v. R. [1977] 51 ALJR 731 ***(refd)***
R. v. Pestano [1981] Crim. LR 397 ***(refd)***
R. v. Governor of Pentonville Prison, ex parte Osman [1990] 1 WLR 277 at pp. 299-300 ***(refd)***
R. v. Governor of Brixton Prison, ex parte Schtraks [1964] AC 396 at p. 580 ***(refd)***
R. v. Governor of Pentonville Prison, ex parte Sinclair [1991] 2 AC 64 ***(refd)***
Atkinson v. United States of America Government [1971] AC 197 ***(refd)***
R. v. Governor of Brixton Prison, ex parte Kotronis [1971] AC 250 ***(refd)***

Legislation referred to:
Extradition Act 1870, ss. 2, 3(1), (2), 8, 9, 10
Extradition Act 1989, s. 11(3)
Magistrates' Courts Act 1980, s. 6(1)

JUDGMENT

Lord Templeman

My Lords,

I have had the advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I agree with the reasons given for having allowed the appeal.

Lord Roskill

My Lords,

I have had the advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I too agree with the reasons given for having allowed the appeal.

Lord Bridge of Harwich

My Lords,

I have had the advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I too agree with the reasons given for having allowed the appeal.

Lord Goff Of Chieveley

My Lords,

The Director of Public Prosecutions, acting on behalf of the Government of Sweden, appealed to this House against a decision of a Divisional Court (Stuart-Smith LJ and Popplewell J.) by which the Court granted an application by the respondent, David Thomas Alves, for *habeas corpus* following upon the committal of the respondent by the Metropolitan Stipendiary Magistrate to custody pending extradition to Sweden at the request of the Swedish Government. The appeal was brought by leave of this House.

On 20 July, this House allowed the appeal, stating that the reasons for so doing would be given later. I now set out the reasons for which I agreed that the appeal should be allowed.

The matter arose as follows. On 10 April 1985 Stephen John Price pleaded guilty in Sweden to aggravated drug offences relating to the distribution in Sweden of a substantial quantity (believed to be about 140 kilos) of cannabis imported from abroad, and was sentenced to imprisonment for seven years. On 4 September 1989, while serving that sentence, Price, who had previously made a statement to the police, appeared before Senior District Judge Barbro Sjosten sitting in the Goteborg City Court, and was examined by the District Prosecutor. Public Defending Counsel was present, as was an interpreter. The examination of Price took place in the context of proceedings for the remand *in absentia* of the respondent. Although Price did not give his evidence on oath (because under Swedish law an accomplice cannot be required to give evidence on oath), he was reminded of his duty to speak the truth when questioned in Court, and he declared himself to be aware of his duty of truthfulness. The evidence then given, consisting of both the questions of the Prosecutor and Price's answers to those questions, was recorded on tape. A transcript of this evidence in English was available in the present proceedings, running to 21 pages. In his evidence, Price described in detail the dealings in cannabis in which he had been involved. Throughout his evidence, Price implicated the respondent (whom he identified from a photograph) in those dealings as the man who had informed him of the consignment of cannabis in Sweden, and had asked him and a man named Ryan (who had also been sentenced to seven years imprisonment) to deliver it to customers in Sweden. Throughout his dealings with the cannabis in Sweden Price was, as he explained, answerable to the respondent; and he described in detail his conversations with the respondent during which he received instructions from him.

In 1989, the Swedish Government commenced proceedings for the extradition of the respondent from this country on charges relating to the importation of cannabis into Sweden, and the distribution of cannabis in Sweden. On 31 January 1990, the Secretary of State issued his order to proceed. In early April 1990 Price was released from prison in Sweden after serving approximately five years of his sentence. On 6 April 1990 he returned to this country, but at Dover he was found to be in possession of cannabis and was arrested. For that offence, he was sentenced to six months imprisonment. On 1 June 1990 the respondent was arrested in London and, following the first hearing of the extradition proceedings at Bow Street Magistrates' Court, he was remanded in custody. On

6 July Price was released from prison in this country. The committal proceedings, following upon the Secretary of State's order to proceed, took place at Bow Street on 16 August 1990. Meanwhile, on 20 July, at the request of the respondent's solicitors, Price had sworn an affidavit repudiating his Swedish evidence in so far as it implicated the respondent. At the hearing before the Magistrate on 16 August, the transcript of Price's evidence before the Court in Sweden was admitted in evidence without objection. Price was then called to give evidence in person on behalf of the respondent, and he again repudiated his evidence before the Swedish Court in so far as it implicated the respondent, on the ground that his evidence had been obtained by pressure exerted upon him by officers of the Swedish and Norwegian police. The Magistrate however decided to commit the respondent.

On the respondent's application for *habeas corpus*, the Divisional Court decided to allow the application. It was common ground that the transcript of Price's evidence before the Swedish Court was admissible in extradition proceedings under paragraph 12 of the First Schedule to the Extradition Act 1989. However, impressed in particular by the fact that Price was an accomplice who had retracted his Swedish evidence before the Magistrate, the Court decided to discharge the order made by the Magistrate.

I turn first to the governing statute, which is now the Extradition Act 1989. The Act provides for two procedures for extradition between the United Kingdom and foreign states, the new and the old. The new procedure is set out in Part III of the Act, which is applicable where the new procedure is available as between this country and the relevant foreign state. Where however, as in the present case, there is an Order in Council under s. 2 of the Extradition Act 1870 in force in relation to a foreign state, the First Schedule to the Act of 1989 (which derives from the Act of 1870 and certain associated enactments) applies, subject to the terms of the Order in Council which embodies the relevant Treaty. This is, of course, the old procedure, which was the procedure applicable in the present case. For that procedure, we have therefore to turn to the First Schedule.

The most relevant paragraph of the First Schedule is paragraph 7(1), which provides as follows:

> In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Schedule) would, according to the law of England and Wales, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England or Wales, the metropolitan magistrate shall commit him to prison, but otherwise shall order him to be discharged.

The applicable law, if a person is accused of committing a crime in this country, is to be found in s. 6(1) of the Magistrates' Courts Act 1980, which provides that:

> ... if a magistrates' court inquiring into an offence as examining justices is of opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused on trial by jury for any indictable offence, the court shall commit him for trial; and, if it is not of that opinion, it shall ... discharge him.

In the present case, the foreign warrant was duly authenticated. The evidence produced included a transcript in English of Price's evidence before the City Court of Goteborg; and it was not disputed that this evidence was admissible under paragraph 12 of the First Schedule. That evidence was, *prima facie*, of itself sufficient to justify the decision of the Magistrate that the respondent should be committed. However, as I have recorded, Price gave evidence before the Magistrate in the course of which he retracted his Swedish evidence in so far as it implicated the respondent. Moreover Price was, on the case for the Swedish Government, an accomplice of the respondent. Even so, the Magistrate decided to commit; and the question arises whether he was, in those circumstances, entitled to do so.

Before the Appellate Committee Mr.. Nicholls Q.C. submitted, on behalf of the Swedish Government, that in committal proceedings in this country the same test is applicable as in the case of a submission by the defendant of no case to answer at the end of the prosecution evidence at his trial. In this connection he relied in particular on the statement of principle by Lord Lane CJ, delivering the judgment of the

Court of Appeal in *R. v. Galbraith* [1981] 73 Cr. App. R. 124 at p. 127, where he said:

> How then should the judge approach a submission of no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there **is** evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ...
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

Mr. Nicholls, referring to the speech of Lord Diplock in *Haw Tua Tau v. Public Prosecutor* [1982] AC 136 at p. 151, reserved for the future the argument that this test was too favourable to the defendant. I wish only to comment that, in extradition cases, it appears to have been the practice, at least since *R v. Zossenheim* [1903] 20 TLR 121, that the Magistrate, when deciding whether to commit, will take account not only of evidence tendered on behalf of the requesting state, but also of evidence given on behalf of the accused. At all events, Mr. Nicholls was content in the present case to proceed on the basis of the law as stated in *Galbraith*, and on that basis he submitted that the Magistrate was entitled, on the evidence before him, to conclude that there was such evidence before him as would justify the committal of the respondent, the question of the reliability of Price's evidence being a matter for the Swedish Court. In support of this submission, Mr. Nicholls relied on the decision of the Court of Appeal in *R v. Donat* [1985] 82 Cr. App. R. 173, in which the Court of Appeal held that, on the facts of that case, in which a prosecution witness under cross-examination retracted evidence which he had given in chief implicating the defendant, the Judge did not err in declining to withdraw the case from the jury on a submission of no case to answer, the credibility of the witness being essentially a matter for the jury.

I wish to add that, in the course of his submissions, Mr. Nicholls referred the Appellate Committee to *R v. Golder* [1960] 1 WLR 1169, in which Lord Parker CJ, delivering the judgment of the Court of Criminal Appeal, stated (at pp. 1172-3):

> In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.

This statement was subsequently applied in *R. v. Oliva* [1965] 1 WLR 1028, at pp. 1036-7, and was relied on by Mr. Newman Q.C. in the course of his submissions on behalf of the respondent as applicable by analogy in the present case. In my opinion, however, too much can be read into it. It would, I consider, be wrong to read it as requiring that in every case where a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the jury should be directed that such evidence should be regarded as unreliable: see *Driscoll v. R.* [1977] 51 ALJR 731 at p. 740 per Gibbs J., with whom Barwick CJ agreed at p. 734. Thus in *R. v. Pestano* [1981] Crim. LR 397 it was held by the Court of Appeal that the credibility of evidence given by a witness inconsistent with a statement previously made by him was a matter for the jury to consider, subject to a proper warning by the Judge as to the weight to be attached to the evidence. In any event, as appears from the context in both *Golder* and *Oliva*, the burden of Lord Parker's statement is to be found in the second part of it, under which the jury is to be directed that the witness's previous statement will not as such be evidence upon which the jury can act.

For the respondent, Mr. Newman Q.C. did not dispute that the applicable test was to be found in *Galbraith*. He however submitted that the Magistrate was obliged to look at the whole of the evidence emanating from Price and that,

since Price had retracted his Swedish evidence in so far as it implicated the respondent, that evidence must be regarded as worthless and wholly unreliable, and so incapable of forming the basis of a committal. In my opinion, that submission was too sweeping. There can, after all, be more than one possible explanation why a witness may retract evidence given by him on a previous occasion; and, as must have been contemplated in *R. v. Donat*, one possibility may be that it is the later retraction, rather than the earlier evidence, which is not worthy of belief. At all events in the present case the question whether, in the light of Price's subsequent retraction before the Magistrate, his Swedish evidence was sufficient to justify the respondent's committal, was essentially a matter for the decision of the Magistrate, who had heard Price give evidence before him. Indeed, if Mr. Newman was right, retraction in this country of evidence previously given in the requesting state would *ipso facto* discredit the evidence so given and so deprive the Magistrate of any power to commit on that basis. I do not think that that can be right. If the Magistrate concludes, on the evidence before him, that the previous evidence is such that a jury properly directed could not properly convict upon it, then, on the principle stated in *Galbraith*, he should not commit. This was the approach adopted by the Divisional Court in *R. v. Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277 at pp. 299-300, where it was stated that the Magistrate should reject any evidence which he considers to be worthless. But otherwise, on the principle stated by Lord Lane CJ, if the prosecution evidence is such that its strength or weakness depends on the view to be taken of its reliability, the Magistrate is entitled to act upon that evidence in deciding whether there is sufficient evidence to justify an order for committal. That was evidently the conclusion reached by the Magistrate in the present case. In my opinion, it was a conclusion which he was entitled to reach on the evidence before him.

The same approach must apply to the fact that Price was, on the Swedish Government's case, an accomplice of the respondent, a matter upon which Mr. Newman also relied. Such a fact cannot *ipso facto* render Price's evidence worthless, even where, as here, the evidence of the accomplice is uncorroborated (see *R. v. Governor of Brixton Prison, ex parte Schtraks* [1964] AC 556 at p. 580, per Lord Reid). This is no doubt a matter which the Magistrate should take into account when considering whether a witness's evidence is to be rejected as worthless; and I have no doubt that in the present case the Magistrate did take it into account, together with the fact that Price had retracted his earlier evidence implicating the respondent, when deciding whether to make an order for committal.

The Divisional Court, in holding that the Magistrate erred in committing the respondent, also referred to the fact that Price had stated before the Magistrate that he would not return to Sweden to give evidence at the trial of the respondent if he was extradited to Sweden. It is not clear what reliance the Court placed on this point, which they described as "an additional difficulty". However, before the Appellate Committee Mr. Newman placed no reliance upon it. Certainly, it is not easy to see on what basis the Magistrate could have taken that fact into account when deciding whether or not to commit the respondent; for the point only arises if there was sufficient evidence to justify the committal, in which event the Magistrate was bound under paragraph 7(1) of the First Schedule to commit the respondent. In fact, on the evidence available, it appears that the Swedish Court, under the procedure applicable in that country, could admit in evidence Price's retraction in this country of the evidence previously given by him in Sweden.

Before the Appellate Committee Mr. Newman however relied on certain additional points which had apparently been raised by him before the Divisional Court, but which the Court did not in the circumstances find it necessary to consider in its judgment.

His first point related to the jurisdiction of the Swedish Courts. He relied upon the fact that the evidence of Price, although (if accepted) it implicated the respondent in the commission of the relevant offences, did not provide any evidence that the respondent was himself in Sweden at the time when those offences were committed. On that basis he submitted that, having regard to the terms of the Treaty between Sweden and the United Kingdom, the crimes of which the respondent was accused were not extradition crimes within the definition of that expression in paragraph 20 of the First Schedule to the Act of 1989. This was

because, under Article 1, the Treaty related only to persons being accused or convicted of offences committed within the territory of the requesting party. The submission however ignores Article 3(2) of the Treaty. Article 3(1) specifies offences for which extradition is to be reciprocally granted; but Article 3(2) provides that extradition is also to be granted for participation in those offences, provided that the participation was punishable by the laws of both High Contracting Parties. I for my part cannot see why, subject to compliance with the proviso, a person should not be liable to be extradited under the terms of the Treaty if he was party to a crime committed in Sweden, such as, for example, the importation of drugs into Sweden, even if he was not himself in Sweden at the time of the importation. In such circumstances it cannot in my opinion be enough for the respondent simply to rely, without more, upon lack of evidence of his presence within the territory of the requesting state at the time of the commission of the relevant offence. Mr. Newman however went on to submit that, before the Magistrate could commit the respondent, there must be evidence before him to the effect that the Courts of the requesting state had jurisdiction, under its own laws, to try the respondent for his participation in the offences committed in Sweden, when he himself was not in Sweden at the relevant time. The submission was *however* inconsistent with the law as stated by this House in *R v. Governor of Pentonville Prison, ex parte Sinclair* [1991] 2 AC 64, in which it was made clear in the speech of Lord Ackner (with which the remainder of the Appellate Committee agreed) that, under the provisions of the Extradition Act 1870, the powers of the Magistrate are specifically laid down in s. 3(1), 8, 9 and 10 of the Act; and that in consequence, apart from consideration where appropriate whether the offence in question was an offence of a political character, the Magistrate is not concerned with questions of foreign law at all, being concerned only with committal proceedings under English procedure in relation to an English crime or crimes specified in the Secretary of State's order to proceed (see pp. 81-92 of Lord Ackner's speech). The same principle must apply to the old procedure as stated in the First Schedule to the 1989 Act. It follows that the Magistrate in the present case committed no error in failing to ascertain the scope of the jurisdiction of the Swedish Courts. I wish to add that, even if it had been suggested that the Secretary of State had erred in law in this respect in the present case (and no such suggestion was made), any such submission would have had to be founded upon evidence of the relevant provisions of Swedish law, and no such evidence was before the Divisional Court in the present case.

Mr. Newman also sought to invoke s. 11 (3) of the Act of 1989, which confers upon the High Court jurisdiction to order a person's discharge if, having regard to certain matters specified in the subsection, it would be unjust or oppressive to return him to a foreign state. It was Mr. Newman's submission that the matters to which regard should be had in the present case were (1) the lapse of time between the commission of the alleged offences and the request for extradition, and (2) the fact that the accusation against the respondent was contrary to the interests of justice, in that it would lead to the trial of the respondent in Sweden on the basis of the record of Price's evidence, despite the fact that Price had subsequently retracted that evidence in this country in so far as it implicated the respondent. However it is plain from the 1989 Act that s. 11(3) applies only to the new procedure for extradition, set out in Part III of the Act, and has no application to the old procedure, set out in the First Schedule, which is applicable in the present case. Mr. Newman also submitted that in the above circumstances the order for committal of the respondent was an abuse of the process of the Court, and for that reason the Court should exercise its discretion to refuse to make such an order. But it is well established by authority of this House (see *Atkinson v. United States of America Government* [1971] AC 197, and *R v. Governor of Brixton Prison, ex parte Kotronis* [1971] AC 250) that, until the enactment of s. 11(3) of the Act of 1989, no such discretion was vested in the English Courts in extradition matters, the relevant discretion being vested in the Secretary of State (see *Ex Parte Sinclair* at pp. 80-81, per Lord Ackner). It is of course open to the respondent to make such representations as he thinks fit in this regard to the Secretary of State.

It was for these reasons that I was unable to accept any of the submissions advanced on behalf of the respondent, and that I therefore concluded, in agreement with the other members of the Appellate Committee, that the appeal should be allowed.

Lord Jauncey of Tullichettle

My Lords,

I have had the advantage of reading the speech of my noble and learned friend, Lord Goff of Chieveley. I too agree with the reasons given for having allowed the appeal.